stage that she committed the offence alleged, where symptoms of the brain disfunction in the form of confusion, disorientation, stupor, sensory and speech disturbances are present then, depending on the severity of these symptoms, she is very likely to come under the purview of either the *McNaughton* rules of insanity or of diminished responsibility. If it was during the prodromal stage again depending on the nature and severity of the prodromal symptoms she could come under the purview of diminished responsibility. If it was during the incubation stage, it is very unlikely that there would be impairment of the brain function and therefore it is very unlikely that she would come under the purview of diminished responsibility. Based on the facts presented by the prosecution Dr. Ngui's opinion was that it is improbable that she could have been suffering from the frank stage of encephalitis on 6th January and it is unlikely that she could have been suffering from the prodromal stage of encephalitis on that day and if she was suffering from encephalitis at the incubation stage, the fact that during this stage there were usually no symptoms would mean that the illness at that stage would not have adversely affected her mental responsibility at that time.

The trial judges, on the whole of the evidence, were not satisfied on the balance of probabilities, that at the time of the commission of the offence the first appellant was suffering from any abnormality of the mind. They then went on to find, even assuming she was at that time suffering from encephalitis, that they were not satisfied on a balance of probabilities that the illness had caused impairment of the brain function so as to have substantially impaired her mental responsibility for her acts in causing the death of Mrs. Watanabe.

In our judgment there was ample evidence to support the trial judges' findings. Even Dr. Tan, the consultant physician under whose care she was placed eight days after the commission of the offence, throughout the period she was under his care diagnosed her as suffering from meningitis. Although, when subsequently reviewing the case, he arrived at the opinion that she could have been suffering from encephalitis rather than meningitis, he could not say positively that she was so suffering at the time of the commission of the offence and, if she were, he was of the opinion that very likely the illness was at the incubation or prodromal stage. He also said that her actions on that day do not suggest to him that there was any impairment of the function of her brain.

For all these reasons the appeals of both appellants are dismissed.

Appeals dismissed.

Solicitors: *David Marshall; J. Tan Chor-Yong & Co.*

WAH TAT BANK LTD. & ORS. v. CHAN CHENG KUM & ORS.

[O.C.J. (Winslow J.) July 24, 1972]

[Singapore — Suit No. 1284 of 1961]

Shipping — Carriers — Bare-boat charterparty — Conversion — Wrongful delivery of goods — Liability as joint tortfeasor.

Tort — Conversion — Liability of tortfeasor — Re-trial of issue — Civil Law Act (Cap. 30, 1970 Edn.), s. (11)(a).

Practice and Procedure — Re-trial — Whether interlocutory judgment of Federal Court bars further proceedings against co-defendant under "single judgment" rule — Meaning of "sued" in Civil Law Act (Cap. 30, 1970 Edn.), s. 11(1)(a).

This was an action involving the re-trial of the issue whether the first defendant was also liable in conversion with the second defendants who had already been so found liable by the Federal Court ([1967] 2 M.L.J. 263) as confirmed by the Privy Council ([1971] 1 M.L.J. 177).

At the commencement of the re-trial, two preliminary objections were raised as follows:

(i) that the final judgment already given in this case against the second defendants by virtue of the assessment of damages in the sum of $570,500 subsequent to the Federal Court's interlocutory judgment against them was a bar to all further proceedings against the first defendant because of the single judgment rule and because "sued" in section 11(1)(a) of the Civil Law Act (Cap. 30) bears its ordinary and natural meaning and that the first defendant, who was a defendant in the same action in which a final judgment had been given against the second defendants, had been sued within such ordinary and natural meaning and that accordingly all further proceedings against the first defendant were completely barred and that the plaintiffs' claim against him must be dismissed;

(ii) that it was not open to the court on re-trial to re-open the question as to whether the second defendants were in truth liable and that as the plaintiffs had asked for and obtained judgment against the second defendants the matter was not open to the trial court for review on the ground that the Federal Court judgment was admittedly sustainable only on the basis that there was a bare-boat charterparty in existence, i.e., that the master and crew of the vessels which made wrongful delivery of the goods in question were the servants of the second defendants and not of the first defendant.

Both questions were answered in favour of the contentions put forward on behalf of the first defendant and the re-trial proceeded on the basis, that no matter what findings of fact were made at the end thereof, this claim against the first defendant would be dismissed because section 11(1)(a) of the Civil Law Act did not avail the plaintiffs. Section 11(1)(a) reads:

"(a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage".

Two issues arose in the course of the re-trial:

(i) whether, assuming, that the bare-boat charter point was still at large, on the evidence adduced at the re-trial there was in fact a bare-boat charter of the vessels owned by the first defendant to the second defendants, the shipping company which had been incorporated on 30th December, 1960 and had carried on the business of ship owners, merchants and shipping agent, which had formerly been carried on by the first defendant alone as sole proprietor;

(ii) whether the first defendant was a joint tortfeasor together with the second defendants in the wrongful delivery of the goods concerned by virtue of his having acted in concert with the second defendants in causing such wrongful delivery independently of the fact that he was the managing director of the second defendants.

Held: (1) the terms of the Federal Court judgment together with the evidence before the court led to the conclusion that there was in fact a bare-boat charter of the vessels concerned by the owner, the first defendant to the second defendants;

(2) the evidence produced before the court at the re-trial together with the failure of the first defendant to give any evidence led to the conclusion that the first defendant was also liable as a joint tortfeasor with the second defendants by directing and procuring the commission of the acts of conversion to which he was privy, the acts being the acts of delivery of the goods to the shipper and not to the named consignee.

Cases referred to:-

(1) *Baumvoll* v. *Gilchrest & Co.* [1892] 1 Q.B. 253 at p. 259.

(2) *Cory & Son* v. *Dorman, Long & Co.* (1936) 41 Com. Cas. 224.

(3) *Harriman* v. *Harriman* [1909] P. 123 at 144.

(4) *Williamson* v. *Rover Cycle Co.* [1901] 2 I.R. 619.

(5) *The Koursk* [1924] P. 155.

(6) *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co.* [1921] 2 A.C. 465.

(7) *Performing Right Society* v. *Ciryl Theatrical Syndicate* [1924] 1 K.B. 2.

(8) *George Wimpey & Co. Ltd.* v. *British Overseas Airways Corporation* [1955] A.C. 169.

(9) *Isaacs* v. *Salbstein* [1916] 2 K.B. 139.

CIVIL SUIT.

J. C. Le Quesne, Q.C. and *M. Karthigesu* for the plaintiffs.

R. J. Parker, Q.C. and *J. Grimberg* for the defendants.

Winslow J.: I shall assume for the purposes of this judgment that I need not set out in detail the reasons why the Judicial Committee of the Privy Council found itself able to reach the conclusion that the shipment of certain goods, the subject matter of this action for conversion was a delivery to the vessels, "Hua Heng" and "Hua Li", owned by the first defendant and chartered by the second defendants, as bailees for the plaintiffs so that thereby the pledge of the said goods to them was completed and the plaintiffs given the possessory title, on which they relied, entitling them to succeed in their claim for conversion.

The Privy Council accordingly dismissed the appeal of the two defendants herein against the judgment of the Federal Court in favour of the plaintiffs against the second defendants herein for damages to be assessed by the Registrar and confirmed the order that the remaining issue as to whether the first defendant was also liable in conversion should be remitted for a re-trial.

This issue eventually came before me for re-trial on 6th March 1972, damages having been finally assessed, on an appeal from the Registrar, on 20th June 1969 in the sum of $570,500 which the second defendants have been unable to pay although they have paid slightly more than the total taxed costs and still have £500 due back to them on that score.

The parties were represented by Mr. Le Quesne, Q.C. with Mr. Karthigesu for the plaintiffs and Mr. Parker, Q.C. with Mr. Grimberg for the defendants.

Mr. Le Quesne opened his case for the plaintiffs with a brief account of the previous history of the proceedings in this action culminating in the order of the Federal Court for the present re-trial of the issue as confirmed by the Privy Council as already stated. Whilst he was in the process of making submissions on what he considered to be the proper scope of the re-trial he ventured to submit that the Federal Court's judgment might be against the wrong defendant but that that was, nevertheless, no bar to this court's giving judgment against the first defendant Mr. Parker, who seemed to have been anxious to be heard on certain preliminary objections, immediately took his cue from Mr. Le Quesne's submissions at this stage to state quite emphatically that he did not agree that the judgment of the Federal Court was no bar to my giving judgment against the first defendant.

From then on until 4.00 p.m. on Thursday, 9th March, 1972, as recorded on page 35 of my notes, I heard arguments from both counsel on two preliminary points of objection. In the course of that argument Mr. Parker handed up two sets of documents, Ex. PD1 and PD2 setting out the agreed position between the parties on each of these points.

It may be useful at this stage to set out in full the agreed position stated out in these exhibits: —

Exhibit PD1 reads as follows:

"THE SECTION 11 POINT

1. It is accepted by both parties that under common law final judgment against one joint tortfeasor operates as a complete bar to all further proceedings against any other joint tortfeasor whether in the same action or otherwise.
2. It is accepted by the defendant Chan that the Federal Court judgment, being only interlocutory, is not by itself a complete bar to all further proceedings against the defendant Chan under the common law.
3. It is accepted by the plaintiffs that the Federal Court judgment, coupled with the assessment of damages thereunder, constitutes a final judgment and is a complete bar at common law to all further proceedings against the defendant Chan.
4. It therefore follows that the plaintiffs' claim against the defendant Chan is now barred and that the claim against him must be dismissed unless the common law rule has been altered by statute.
5. It is for this reason that section 11(1)(a) of the Civil Law Act becomes relevant. The plaintiffs contend that that section has altered the common law rule so that the final judgment already given in this case is not a bar to further proceedings against the defendant Chan.
6. It is accepted by both parties that section 11(1)(a) does alter the common law rule so that final judgment against one joint tortfeasor is no longer a bar to an action against any other joint tortfeasor if, but only if, he has not been 'sued' within the meaning of that sub-section.
7. The plaintiffs contend that the final judgment already given in this case is not a bar to further proceedings against the defendant Chan because they contend that 'sued' in section 11(1)(a) means 'sued to final judgment', and since Mr. Chan has not been sued to final judgment, there is no complete bar to further proceedings against him.
8. If this contention is upheld this court is free to consider and decide upon the plaintiffs' claim against the defendant Chan within whatever may be held to be the proper scope of the re-trial ordered by the Federal Court.
9. The defendant Chan contends that the final judgment already given in this case is a bar to all further proceedings against the defendant Chan because 'sued' in section 11(1)(a) bears its ordinary and natural meaning and the defendant Chan, who is a defendant in the

same action in which the final judgment has been given against the defendant company, has been 'sued' within such ordinary and natural meaning.

10. If this contention is upheld then all further proceedings against the defendant Chan are completely barred and the plaintiffs' claim against the defendant Chan must be dismissed."

Exhibit PD2 reads as follows:

"THE SO-CALLED BARE-BOAT CHARTERPARTY POINT

1. This point only arises if the defendants fail on the section 11 point. It would then be necessary to decide what is the proper scope of the re-trial ordered by the Federal Court.
2. It was from the outset alleged by both the defendants that the Master and crew were the servants of the defendant company and not of the defendant Chan.
3. The sole ground upon which the two defendants sought to establish this allegation was that there was an oral bare-boat charterparty in existence between the defendant Chan (the owner of the vessels on which the goods were carried) and the defendant company.
4. It is accepted by the plaintiffs that, if there was a bare-boat charterparty in existence, then the Master and crew were the servants of the defendant company and not of the defendant Chan.
5. It is accepted both by the plaintiffs and by the defendant Chan that the Master and crew were employed either by the defendant company or by the defendant Chan and that they were not employed jointly by both defendants.
6. It is accepted by the plaintiffs that the only basis upon which judgment could have been given against the defendant company is that the Master and crew were the servants of the defendant company and not of the defendant Chan.
7. It is further accepted by the plaintiffs that if the Master and crew were the servants of the defendant company and not of the defendant Chan, the only remaining issue would be whether the defendant Chan is also liable, that is to say whether he is liable as a joint tortfeasor with the company.
8. The plaintiffs contend that it is open to the court to investigate and decide upon the question whether the Master and crew were the servants of the defendant company or of the defendant Chan and to hold that the Master and crew were the servants of the defendant Chan and not of the defendant company, that is to say that there was no bare-boat charterparty in existence.
9. The defendant Chan contends that such matters are not open to this court having regard, principally, to the fact that the plaintiffs asked for the judgment in fact given, which judgment is admittedly sustainable only on the basis that the Master and crew were the servants of the defendant company and not of the defendant Chan, that is to say that there was a bare-boat charterparty in existence.
10. The defendant Chan further contends that since, in the last paragraph of the written judgment of the Federal Court and in the formal order pursuant thereto, the only issue ordered to be retried is the issue whether the defendant Chan is also liable, it is not open to this court to investigate or decide upon the question whether the defendant company was in truth liable, that is to say whether the Master and crew were in truth the servants of the defendant company at all.
11. The plaintiffs contend that the intention of the Federal Court is shown by the whole of their written judgment to be that the whole issue which of the defendants is liable or whether both are liable for the conversion of the goods, should be retried and that this court should give effect to that intention notwithstanding the terms of the last paragraph of the written judgment, the terms of the formal order, and the other matters relied upon by the defendant Chan."

When the court adiourned at the end of the sitting on Thursday, 9th March, 1972 I indicated that I would give my decision on both these points on Monday, 13th March, 1972. A decision on the first point in favour of the first defendant would have resulted in the dismissal of the action but it was agreed by both counsel that no matter what I decided with regard to these two preliminary points on Monday the 9th, the action would proceed as ordered by the Federal Court on the issue whether the first defendant was also liable in conversion like the second defendants who had already been found so liable by the Federal Court judgment as confirmed by the Privy Council.

On Monday, 9th March, 1972 I answered both questions on the preliminary points in favour of the first defendant, i.e. in favour of Mr. Parker's contentions. I then proceeded to hear the case on the basis that, in any case, the action would, at the end of the trial, be dismissed.

Mr. Le Quesne then continued his opening address, called one witness, P.W. 1, Mr. Choo Chew Sing, now managing director of the first plaintiffs. He also formally put in the record of evidence of Mr. Chan Cheng Kum, the first defendant, given at the previous trial, i.e. those passages which he had read out earlier, as set out in Ex. P21. He then concluded his case for the plaintiffs.

Mr. Parker called no evidence on behalf of the first defendant.

Both counsel concluded their addresses by Tuesday evening and I reserved judgment indicating that I would deliver a considered judgment incorporating not only my decision on the issue at re-trial but also my reasons for upholding the preliminary objections.

I now proceed to do so.

I should like to say at the very outset that this is not the usual kind of action which comes before the High Court, especially on a re-trial of an issue such as the one before me. Secondly, it is certainly unusual to be faced with two preliminary objections in the midst of an opening address by counsel for the plaintiffs before one has had an opportunity of becoming better acquainted with the facts involved.

I have accordingly had to rely largely on the addresses of both counsel in the course of argument on the two preliminary points and to those portions of the record before the Privy Council to which they saw fit to draw my attention. Fortunately, Exhibits PD1 and PD2 stating the agreed positions between the parties have to some extent helped to narrow down the areas of dissension on questions of fact as well as questions of law.

Although I had previously read through the judgments of the original trial judge, the Federal Court and the Privy Council and the pleadings in so far as they seemed to me to fall within the ambit of the issue before me on the re-trial, I have so far as possible read only those portions of the record to which one counsel or the other drew my attention in the course of argument.

So far as the actual hearing of the re-trial is concerned, that is after I had decided in favour of the contentions on behalf of the first defendant, I have

here again had to rely, apart from the only evidence in this case which I actually heard, that is the evidence of Mr. Choo Chew Sing (P.W.1), only on those portions of the record to which counsel again drew my attention. So far as submissions on relevant legislation and cases cited by counsel are concerned I have so far as possible considered not only those portions thereof to which my attention was particularly drawn but have also permitted myself the liberty of some further reading. In view of the assurances of Mr. Le Quesne and Mr. Parker that I did not have to indulge in any intensive research, however, I have so far as possible tried to limit my reading to the authorities cited by them.

Before giving my reasons for upholding the two preliminary objections, it will, I think, be more useful for me to deliver my judgment first on the issue ordered to be re-tried, regardless of whether I am right or wrong on the preliminary issues, on the basis that, in any case, whatever my findings may be on the re-trial, the claim in this action will be dismissed in so far as it requires a finding whether the first defendant is also liable for conversion.

First Issue at Re-trial: Was there in fact a Bare-boat Charter?

Assuming that the bare-boat charter point is still at large, the first question to be decided is whether the first defendant as owner of the vessels was the employer of the master and crew thereof or whether the second defendants were the employers of the master and crew of each of these vessels as bare-boat charterers, i.e. as charterers of these vessels without master or crew.

With regard to the order for re-trial of the issue before me, I should have thought that I am bound by the finding of the Federal Court that the second defendants were liable in conversion on the basis that they were bare-boat charterers of the vessels concerned. However, since I have been asked to determine whether there was in fact a bare-boat charter in respect of these vessels to the second defendants, I have come to the conclusion that there was.

As *Scrutton* on Charterparties and Bills of Lading, 17th Edition at page 4 provides:

"A charter may operate as a demise or lease of the ship itself, to which the services of the master and crew may or may not be superadded."

The footnote explains that a charter by demise of a ship without master or crew is sometimes called a "bareboat" or "net" charter. *Scrutton* proceeds:

"The charterer here becomes for the time the owner of the vessel; the master and crew become to all intents his servants, and through them the possession of the ship is in him."

A footnote explains that the language in the text is that of Cockburn C.J. The footnote then goes on to cite Lord Esher in *Baumvoll* v. *Gilchrest & Co.*[1] as follows:

"the question" (whether an owner was liable for acts of the captain of his ship) "depends, where other things are not in the way, upon this: whether the owner has by the charter, where there is a charter, parted with the whole possession and control of the ship, and to this extent, that he has given to the charterer a power and right independent of him, and without reference to him to do what he pleases with regard to the captain, the crew, and the management and employment of the ship. That has been called a letting or demise of the ship. The right expression is that it is a parting with the whole possession and control of the ship."

This view was approved by the House of Lords on appeal. The footnote goes on to cite *Cory & Son* v. *Dorman, Long & Co.*[2] for the proposition that it is doubtful if a charter by demise can be constituted except by a document in writing. Slesser L.J. in that case at page 235 stated —

"A preliminary difficulty arises in this case upon which I do not think it necessary to express any final opinion. It is whether, on any view, William Cory and Son, Limited, can be said here to be charterers. In contradistinction to all the cases that have been considered, there is no document in writing in this case of any kind transferring any of the rights, upon which William Cory and Son, Limited, rely, from the Lighterage Company to William Cory and Son, Limited, which can be said to be in the nature of a charter. It has been said on the authority, solely, so far as I know, of an observation of Wigram V.C. in *Lidgett* v. *Williams*, that the rights in a ship can be transferred by charter orally. That passage is quoted in several of the text-books. There is a passage for example in *Carver* to that effect, but when the text book is looked at on that particular point, the only authority is that case. For myself, I wish to leave the matter open."

Slesser L.J. continued:

"I do not think it necessary, however, in this case to express a final opinion upon the point which might contradict the opinion expressed by Wigram V.C. for this reason, that there is here in my opinion upon the finding of the learned judge nothing to constitute a transference of the ownership of the ship, either by charterparty in writing, or orally."

Romer L.J. in the same case shared the doubts expressed by Slesser L.J. but did not wish to express a final opinion on the point.

Mr. Le Quesne submitted to me that an oral bare-boat charterparty was an exceedingly unusual though not impossible arrangement. He said that the only documents relating to the demise of these vessels were records of the first board meeting of the second defendants on 31st December, 1960, after the company had been incorporated the day before, which recorded a critical resolution taken by the chairman of the board of directors and his son (who was also a director) as follows (see page 3 of Ex. D13): —

"That the vessels shall remain the properties of Mr. Chan Cheng Kum, but the limited company undertakes to operate the said vessels along the same lines as previously, maintaining them in good condition and repair, in consideration of which a fee termed 'Bare-boat Charter' of M$500.00 per vessel per month shall be payable to the said Chan Cheng Kum."

Mr. Chan Cheng Kum was the chairman of the board of directors of the second defendants and the first resolution recorded on the same page of Ex.D13 states: —

"That Hua Siang Steamship Co. Ltd." (i.e. the second defendants) "takes over the former business of Mr. Chan Cheng Kum then trading as Hua Siang Steamship Co. and shall be responsible for book debts of the old company as at 31st December 1960 and shall, carry on the existing business as shipowners. shipping agents and merchants."

Mr. Le Quesne also referred to the 20 Mate's Receipts Ex. P4A, B, C & D, to the agreed statement of facts at the first trial, Ex.D14, to certain delivery orders, to pages 156 to 194 of the agreed bundle of documents marked 'X' (containing the indemnities)

and also to the agreed bundle of correspondence marked 'A' and in particular to pages 6 and 8 thereof.

He relied on these documents to show that the first defendant traded as Hua Siang Steamship Co. up to the end of June 1961, but it is quite clear from Ex. D13 and the agreed statement of facts at Ex. D14, to say nothing of letter 5 in bundle 'A' from Chan as managing director of the second defendants to the Overseas Chinese Banking Corporation that, notwithstanding the other documents on which Mr. Le Quesne relied for his proposition that the first defendant operated his vessels until the end of June 1961 under his old firm name, the first defendant as managing director of the second defendants notified by means of a printed circular, not only the second plaintiffs but presumably others as well that his old firm had been incorporated as a limited liability company and that the latter had taken over all assets and liabilities of the former firm and was carrying on the existing business under the same management as shipowners, shipping agents and merchant.

Furthermore, in my view, the agreed statement of facts at Ex. D14 is extremely important and, in particular, that portion of it which Mr. Parker stressed, as follows: —

"After 8/2/61, all outgoings (such as repairs, wages, and Central Provident Fund contributions of crews, lighterage, insurance, docking dues, port dues, ship's stores, bunkers, stevedorage, etc., as well as office wages and overheads) were paid by the company out of its own bank accounts. The company has since its incorporation been paid or credited with all earnings by the vessels, and has discharged or been debited with all outgoings relating to them. It has never accounted to anyone for such receipts and payments."

Towards the end of that agreed statement occurs a significant agreed fact to the effect that the old firm did not trade after 31st December, 1960. In view of this agreed fact I find it difficult to understand why it has been contended by the plaintiffs that the old firm was in fact trading after that date until towards the end of June 1961 when, it was submitted by Mr. Le Quesne, the word "Limited" appeared for the first time in documents after the name of the old firm.

Moreover, as Mr. Parker pointed out, the Federal Court judgment, though not conclusive, can amount to an estoppel *inter partes*. As Farwell L.J. pointed out in *Harriman* v. *Harriman*: [3]

"I do not doubt that as between the parties, the ordinary doctrine of estoppel applies ... but estoppel is only a rule of evidence and the duty imposed on the judge by section 29 which emphasises by expressed enactment the necessity for the court being satisfied as required by section 31 is not restricted by any such rule. Neither the consent nor the admission of the parties justify the court in granting a decree although such consent or admission is acted on continually in ordinary civil suits, and, by parity of reasoning, no rule of evidence which prevents a party as against the other litigant from giving evidence of the truth can bind the court to shut its eyes, if it is not satisfied that all the truth is before it. It is plain that the King's Proctor, if he intervenes, can give evidence to shew that the decree for judicial separation (on the hearing of which he had no power to intervene) was improperly obtained, if it forms one of the grounds on which divorce is asked, and that he or any other person intervening between the *decree nisi* and the decree absolute can do the same; and it would be strange if the court cannot *mero motu* declare that it is not satisfied by the former decree, even although it may, as a general rule, think fit to act on it: the court is at liberty, but is not bound, to accept it."

I accept what Mr. Parker said in his concluding remarks on the bare-boat charter issue at the re-trial, that it was because, perhaps, Mr. Kerr (as he then was) realised the effect of the resolution in Ex. D13, coupled with page 5 of the agreed bundle marked 'A' and the agreed facts in Ex. D14 which led him in the Federal Court to abandon the issue and asked for judgment against the second defendants and that the plaintiffs are now trying to go back on the agreed facts put in before the original trial judge.

That concludes what I have to say about the bare-boat charter point. From the material before me at this trial, notwithstanding the doubts expressed in the *Cory & Son's* case about oral charterparties, the better view would seem to be that there was indeed a bare-boat charter of the vessels to the second defendants and that the plaintiffs have not succeeded in establishing as it was their duty to do, if they sought to saddle the first defendant with responsibility for conversion by the master and crew of each of these vessels, that the first defendant as owner of these vessels was *ipso facto* in whole possession and control of these vessels so as to be vicariously liable for the acts of the master and crew thereof.

Mr. Le Quesne relied on section 103 of the Evidence Act (Cap. 5) as well as on a presumption, which he contended existed, that the owner was the employer of the master and crew and he invited me to draw an adverse inference, from the failure of the first defendant to give evidence, citing section 114, illustration (g) of the Evidence Act in support of this contention which reads: —

"The court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it."

This presumption is based on the principle that if a man withholds evidence which he could give every presumption to his disadvantage consistent with the facts admitted or proved will be adopted (See *Sarkar* on Evidence, 11th Edition page 995 citing *Williamson* v. *Rover Cycle Co.*[4]).

On the facts before me as presented by the plaintiffs I do not feel justified in adopting any presumption to the 1st defendant's disadvantage from his failure to give evidence since to do so would be to draw an inference inconsistent with the facts before me.

Mr. Parker contended that there was no such presumption that an owner was necessarily the employer of the master and crew and that the burden was on the plaintiffs to establish responsibility and that if the plaintiffs desired to prove that the master and crew were servants of the first defendant it was up to them to prove it.

Assuming that he was wrong, he proceeded to emphasise the other matters which I have already dealt with relating to Ex. D13 and page 5 of Bundle 'A', especially the meaning of the word "assets" which he submitted included vessels. He also stressed the agreed facts at Ex. D14 and, in particular, the last sentence thereof providing that the old firm did not trade after 31st December, 1960. He also relied on the Federal Court judgment which though not conclusive, was in effect an estoppel.

I should perhaps stress one further fact, namely, that in Ex. D14, it has been agreed that the second defendants credited the current account of the first defendant, which he kept with the second defendants, with a sum of $18,000 *per annum* for hire of the vessels chartered to the 2nd defendants.

On all the evidence before me I am satisfied on a balance of probabilities that it was more probable than not that the first defendant had parted with the whole possession and control of these vessels retaining the mere shell of ownership thereof. If I am right in this, then there can be no question but that the first defendant cannot be held to be vicariously liable for the acts of the master and crew of each of these vessels. I am satisfied on the evidence that the first defendant took a decision to stop trading under his old firm name with effect from 31st December, 1960 and that the limited company, for whose incorporation he was responsible, commenced to trade as stated in the agreed facts with effect from 1st January 1961.

This is not the first time that a sole proprietor of a trading firm has decided to convert his old firm into a private limited company and, however sinister his motives for so doing may appear to be to the plaintiffs there was no reason why he could not lawfully have done so. There has been no submission that the whole thing was a sham. There may have been some slackness on the part of the second defendants in not adding the word "Limited" to the headings on correspondence in so far as the old firm name appears thereon and in other documents. This is not the first time that such instances of the omission of the word "Limited" after the incorporation of a trading concern have taken place and each case must be considered on the basis of the gravity of the omissions relied upon.

The fact remains that he did announce to the second plaintiffs that the old firm had been incorporated as he said in page 5 of the agreed bundle marked 'A'. There was no evidence before me, apart from some of these documents containing the omission of the word "Limited" after the old firm name, that the plaintiffs were in any way misled into believing that the first defendant was in fact trading under his old firm name or that the old firm name was used in order to lull traders into the belief that the old firm was still conducting business as before or that the second defendants did not in fact commence trading and carry on the business of the old firm as shipowners, shipping agents and merchants as stated quite categorically in the documents to which I have referred.

As the original trial judge found as a fact as sustained by the Federal Court to which their Lordships in the Privy Council attached importance, all parties knew what was going on. The mere fact that the first defendant has been sued as an individual and that the second defendants have been sued as the firm which he incorporated on 30th December, 1960 speaks for itself. To my mind, the suggestion that the first defendant carried on business as before under the old firm name after 1st January 1961 is untenable and is contradicted by the agreed facts.

Second Issue at Re-trial: Was first Defendant a Joint Tortfeasor?

I now turn to the second aspect of this matter which was argued before me at the re-trial, i.e. whether the first defendant is also liable in conversion like the second defendants quite independently of the bare-boat charter issue which I have just decided. Was the first defendant a joint tortfeasor with the second defendants in the conversion of the goods in question as a result of their delivery by the ships to the shippers who were persons not entitled to possession?

The master and members of the crew of each vessel were undoubtedly tortfeasors. The second defendants had already been found to be vicariously liable for the tort committed by the master and crew of each of these vessels.

Before proceeding further, it is important to have clearly in one's mind what is meant by the expression "joint tortfeasors". As Scrutton L.J. said in *The Koursk*,[5] one way of answering this question is by asking another: "Is the cause of action against them the same?" He then proceeded:

"Certain classes of persons seem clearly to be 'joint tortfeasors'; The agent who commits a tort within the scope of his employment for his principal, and the principal; the servant who commits a tort in the course of his employment, and his master; two persons who agree on common action, in the course of, and to further which, one of them commits a tort. These seem clearly joint tortfeasors; there is one tort committed by one of them on behalf of, or in concert with another."

He emphasised that the same damage does not mean the same tort and therefore does not mean the same cause of action. The two elements of *damage* and *injuria* must both be present before joint liability for that tort can arise. He went on to say that in order to "make the tort, you want *a wrongful act* causing *damage* (*i.e.* the *injuria*); and to make the tort the same cause of action, both elements must be the same."

Bearing these important factors in mind, for the purposes of the particular case before me, I have to decide whether the first defendant has been shown to have been acting in concert with the second defendants in the commission of the tort of conversion, *i.e.* was there concerted action to a common end in furtherance of a common design? The actual tortfeasors were the masters and crew of these vessels. There is no direct evidence of any kind tending to show that the first defendant personally directed the crew to make wrongful delivery. Counsel for the plaintiffs accordingly proceeded to explore the proposition as to the circumstances in which a limited company and its managing director can be said to be acting in concert so as to make both of them joint tortfeasors. That was the question, and Mr. Le Quesne proceeded to cite two authorities, *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co.*[6] and *Performing Right Society* v. *Ciryl Theatrical Syndicate.*[7]

Mr. Le Quesne submitted that the question was: did the first defendant expressly or impliedly direct or procure the commission of the acts and that if he did so then he was privy to those acts, the acts being the acts of delivery of the goods to the shippers.

For this proposition he placed reliance on Atkin L.J.'s pronouncement in the latter of these two cases at

page 14/15 as follows: —

"*Prima facie* a managing director is not liable for tortious acts done by servants of the company unless he himself is privy to the acts, that is to say unless he ordered or procured the acts to be done. That is authoritatively stated in *Rainham Chemical Works* v. *Belvedere Fish Guano Co.*, where it was sought to make a company liable for an explosion upon their works in the course of manufacturing high explosives. The company were held liable on the principle of *Rylands* v. *Fletcher*. It was also sought to charge two directors with liability. They were eventually held responsible because they were in fact occupiers of the works. It was contended that they were liable on the ground that they were managing directors of the company, that the company was under their sole control as governing directors, and that they were responsible for the work done by their servants. Lord Buckmaster said: 'I cannot accept either of these views. If the company was really trading independently on its own account, the fact that it was directed by Messrs. Feldman and Partridge would not render them responsible for its tortious acts unless, indeed, they were acts expressly directed by them. If a company is formed for the express purpose of doing a wrongful act or if, when formed, those in control expressly direct that a wrongful thing be done, the individuals as well as the company are responsible for the consequences, but there is no evidence in the present case to establish liability under either of these heads.' Perhaps that is put a little more narrowly than it would have been if it had been intended as a general pronouncement without reference to the particular case; because I conceive that express direction is not necessary. If the directors themselves directed or procured the commission of the act they would be liable in whatever sense they did so, whether expressly or impliedly."

Obviously, the first defendant did not order or procure the crew of these vessels to commit the tort which they did. Mr. Parker submitted that the question really was: Did the first defendant order or procure his co-director son, Chan Kim Yam and Cheah Wee Hock to act as they did? These were the two persons in the limited company who signed the delivery orders relating to the goods in question thereby authorising the wrongful delivery. The crew merely carried out these orders.

Mr. Parker also made the point made by Lord Parmoor at page 488 in the *Rainham* case that governing directors of a company cannot, merely by virtue of holding such office, be held personally liable for the acts of the company as their agents in the absence of evidence that the company is a sham or that the relationship between the directors and the company is either abnormal or based on a sham procedure. It should be remembered that Lord Buckmaster at page 475 said that it may be established by evidence that in its operations it does not act on its own behalf as an independent trading unit, but simply for and on behalf of the people by whom it has been called into existence. With regard to this Mr. Le Quesne emphasised that the company was the first defendant's "creature".

The plaintiffs relied on the admissions made by the first defendant in the course of his original trial as set out in Ex. P21. It was submitted that the first defendant's evidence at that trial does suggest the inference that the first defendant procured the delivery of the goods to the shippers. Reliance was placed on sections 17 and 18 of the Evidence Act amongst others.

The plaintiffs rely on P21, being extracts from the evidence of the first defendant at the previous trial, as admissions suggesting the inference that he procured delivery of the said goods to the shippers.

It should be borne in mind that I have not, however, had the opportunity of hearing the first defendant give evidence and accordingly whatever inferences can be drawn from Ex. P21 are inferences which have nothing to do with the credibility of the witness as assessed by a judge who has had an opportunity of observing him whilst giving evidence and of making his own assessment of his credibility. Subject to this, I nevertheless was enabled to draw certain inferences from the salient facts which emerged from Ex. P21: —

1. The first defendant was the owner of the vessels concerned before 1961 and had been sole managing proprietor of the old firm which he later incorporated;
2. When cargo arrived in Singapore somebody presented the shipping documents and asked for delivery of the cargo. The first defendant said that he normally never saw these documents when presented and that his son and Cheah Wee Hock dealt with these documents;
3. He said that sometimes persons claiming the cargo were unable to produce shipping documents. In such cases, he said, they were asked for indemnities and goods were then delivered to them. He said that his co-director, Chan Kim Yam, decided whether cargoes should be released against indemnities and that whenever people applied for release of cargoes against indemnities he referred them to Chan Kim Yam. He merely looked after the finance, freight rates and repairs to vessels;
4. His son, Chan Kim Yam and Cheah looked after the delivery department. He said that, as managing director, he had not given them any specific instructions and that the matter was in the discretion of Chan Kim Yam whether to release any cargo on the indemnity;
5. Early in 1961, Chan Kim Yam reported to the first defendant that there was delay between delivery and the receipt of the shipping documents. The first defendant said that, as a result, he arrived in Singapore and saw "the old towkay", Lee Chin Tian at the office of the shippers. He said that he was concerned because the mate's receipts might have been exchanged for bills of lading. He admitted that he was personally concerned about the delay in the return of shipping documents;
6. At page 223, the first defendant refers to an agreement he made with the shippers that each of the directors should, in addition, be personally liable to him. That he said was the promise of "Uncle" Lee Chin Tian. This was the time when the first defendant admitted becoming personally involved in negotiations with the 3rd parties. *i.e.* the shippers, to submit not only indemnities signed on behalf of the shippers as a limited company but to submit personal indemnities by each of the directors thereof including Lee Chin Tian. It was because of this personal arrangement with the 3rd parties that he went on delivering against indemnities without production of mate's receipts.
7. It is significant that in this portion of his evidence at the original trial he does use the first person

singular in relation to the arrangements he made after having extracted a promise from Lee Chin Tian to make himself and his co-directors personally liable, quite apart from the indemnities issued by the shippers as a limited company (N.B. "I went on delivering"). He then made a significant statement that even if he had not got this personal promise of the 3rd parties he would have continued to deliver unless other parties claimed. It may well be asked why then did he extract the promise at all?

8. It would appear that the procedure which had existed prior to the formation of the 2nd defendants as a limited company continued afterwards, *i.e.* what the first defendant had personally instituted as a procedure to be observed in relation to the release of the goods and the taking of indemnities without the production of mate's receipts went on as before with one important difference for which he alone was responsible. It seems to me quite clear from this that, notwithstanding what the first defendant said before the trial judge in the earlier proceedings about leaving the matter in the discretion of Cheah Wee Hock and his son, Chan Kim Yam, he was personally taking more than an ordinary interest in the matter for a person who claimed that his duties were confined to finance, freight rates and repairs.
9. He was getting himself personally involved in seeing that deliveries were being effected as they had been done prior to the incorporation of the old firm as a limited company with the added difference that he was personally getting somewhat restive about the fact that his son had complained of delays between the delivery of goods against indemnities and the actual surrender of mate's receipts. Hence the personal indemnities. He said more than once (see line 30 page 223) that even if he had not got their personal promise, he would have continued to deliver as before without the production of a mate's receipt and without any indemnity signed by a bank. At the top of page 225, he said, in answer to a question why he was concerned about the delay in returning the shipping documents after delivering the goods, that he was concerned that Bills of Lading might have been issued and he was thinking in terms of precaution.
10. The first defendant for the first time, at page 246, line 31, suddenly admitted that it was true that on 10/7/61 he realised that the shippers (T.S.C.) could not pay Wah Tat Bank and that he advised his son over the phone not to release further shipments to T.S.C. without mate's receipts.
11. At page 247, the first defendant, when queried about why he did not insist on the production of mate's receipts or bills of lading, replied rather naively that he had no reason to do so because he acted on instructions of the shippers and that, on demand, he had to deliver goods to them on the usual indemnity by the shippers even without the additional personal indemnities by the co-directors which he had personally procured should be submitted on the promise of the old towkay ("Uncle" Lee Chin Tian).
12. At page 249, the first defendant admitted that he controlled the policy of the firm before it was incorporated and that after incorporation of the second defendants this policy did not change.
13. He said that, after 1960, the matter was in the discretion of Chan Kim Yam who was one of the directors. He said he did not give him that discretion. Then he said that he went and saw Lee Chin Tian because Chan Kim Yam was busy in the office. In my view, the inference here is almost irresistible that he dictated the new policy with regard to deliveries which Chan Kim Yam should follow, as in fact he had previously done on matters of policy involving his own personal decision.
14. At page 256, in answer to the court, he said that he never asked whether the shippers had exchanged the mate's receipts for bills of lading. He merely accepted the letters of indemnity. He said that if he got an answer there was no means of checking on it.

Mr. Le Quesne summarised the effect of Chan's evidence and stressed —

(a) the fact that early in 1961 when delays were occurring the first defendant personally made the new arrangements;
(b) that in July 1961 when the first defendant discovered that the shippers were not paying for the goods, he told or advised his son not to deliver goods to the shippers without production of the mate's receipts;
(c) the veracity of the evidence of the only witness called in this case, Mr. Choo Chew Sing, the present managing director of the first plaintiffs with which I shall deal later;
(d) the use of the first person singular in the first defendant's answers even after three years from 1961;
(e) the decision to deliver to the shippers was subject to the practice established by the first defendant and subject to his decision even before the incorporation of the second defendants;
(f) the personal visit made by the first defendant to the shippers and in particular his instructions to his son to insist on mate's receipts

Mr. Le Quesne concluded by saying that the first defendant was still the dominant influence and that he procured delivery to the shippers of goods, consigned by them to the second plaintiffs, including goods which were the subject matter of this action. He said that, even if the first defendant could not be shown to have expressly procured the wrongful acts in question, he, at least, impliedly procured those acts of the second defendants in delivering the goods to the shippers.

I now turn to the evidence of Choo Chew Sing. He said that he was manager of the first plaintiffs in 1961. He said he knew the first defendant and he knew about the shipment of goods by the shippers to Singapore and about their pledge to the bank. He remembered travelling to Singapore in early July 1961,

and that the reason why he made the journey was because of the late payments by the shippers. He met the first defendant on the aeroplane in which they sat side by side. Next morning, 10th July 1961, he went to see Lee Chin Tian and also met the first defendant. They all proceeded to Lee Chin Tian's house for a discussion as there were too many people in Lee Chin Tian's office.

This witness said that the first defendant asked Lee Chin Tian to pay the first plaintiffs $190,000, being the value of the previous shipment. Lee Chin Tian apparently told him to allow him time to await the arrival of the next shipment and to take delivery of that shipment when he would pay the bank. With this suggestion the first defendant disagreed. Choo then said that he himself told Lee to pay the $190,000 first, after which he would be prepared to grant overdraft facilities with the bank in Sibu and that Lee disagreed as he was unable to make such payment.

Apparently the first defendant then became annoyed and spoke to the old man in a loud voice. He said that the first defendant then went to the telephone and he heard him speaking to his son, Chan Kim Yam. He said that he could hear and understand what the first defendant said to his son. He said that the first defendant told his son that in future there should be no delivery without the proper documents.

He was not seriously shaken in cross-examination. When questioned whether he could hear through bricks and mortar he said that the partition might have been made of brick but that there were some passages on either side of the partition and that the telephone was in the middle and that he could hear. In answer to me, he replied that the telephone was placed on a sideboard and that he could see it and the first defendant at the telephone through the passage into the place where he was. He said that the first defendant was audible at that distance which was about 15 feet and that, since he was annoyed, he spoke in a loud voice.

I accept the truth and correctness of what he said, though there may have been some inconsequential discrepancies. I am quite certain that he could hear the whole of the telephone conversation or at least that part of it consisting of what the first defendant said over the telephone to his son. I have no reason whatsoever for doubting the truth of what this witness said before me in evidence and I accept it.

Mr. Parker for the first defendant said that this was a far weaker case than the *Rainham* and *Performing Right Society* cases which were thrown out, and was at a loss to understand how the first defendant could be said to have procured delivery and that the whole issue depended on credibility. He also submitted that there was no need for him to call the first defendant to say what had already been put in in evidence and he said that Chan Kim Yam and Cheah Wee Hock could have been called by the plaintiffs. He submitted that if Chan Kim Yam was in charge of delivery the decision to deliver these goods was his alone and that the policy adopted by his father before the formation of the company had nothing to do with it.

On the evidence before me as adduced by the plaintiffs and in the absence of any evidence by or on behalf of the first defendant I am satisfied that, notwithstanding the decisions in the *Rainham* and *Performing Right Society* cases which went the other way on their own facts, there is material before me on which I can find that the first defendant was also liable in conversion with the second defendants and that both the first defendant and second defendants were joint tortfeasors. On this second issue I consider that I am entitled to draw an adverse inference from the failure on the part of the first defendant to give evidence.

It is true that I refused to draw any adverse inference against him in relation to the first of the two issues argued during the re-trial, that is the issue relating to the bare-boat charter point. On that issue I was of the opinion that there was no sufficient evidence at the conclusion of the plaintiffs' case to show that he retained possession and control of these vessels at the material dates so as to make him responsible for the tortious acts of the master and crew thereof as his servants or agents and that there was some evidence of a bare-boat charter of the vessels to the second defendants which relieved him of the duty to rebut any presumption against him because none arose. I did find at the conclusion of the case for the plaintiffs that there was evidence pointing in that direction and also that the plaintiffs were virtually estopped by the Federal Court judgment from denying that there was in fact a bare-boat charter to the second defendants. On that issue during the re-trial I did not therefore draw any adverse inference with regard to the failure of the first defendant to give any evidence. (See *Williamson* v. *Rover Cycle Co.* above).

On the present issue however the plaintiffs' case points to the conclusion that he did in fact procure the wrongful delivery of the goods concerned. I therefore consider myself entitled to draw an adverse inference from his failure to give or call evidence.

There was, moreover, no evidence before me, not even an assurance from the Bar, that Chan Kim Yam, the son, and Cheah Wee Hock were not available to give evidence before me. All these witnesses including the first defendant could have thrown considerable light on the second issue and at least given me some assurance, which I do not at the moment possess, that the decision to make deliveries resulting in the conversion was taken by Chan Kim Yam as his own personal responsibility as a director of the second defendants. As I have already said, it seems clear to me that Chan Kim Yam was dominated by his father whose brain-child the limited company which he called into being was and for whose protection from liability he considered himself personally responsible. Hence the directions to his son which I have found he gave quite apart from his own admission relating thereto. The delivery by the crew was wrongful. Merely taking personal indemnities from the co-directors of a shipping company in financial difficulties would not right that wrong. In my opinion, the construction placed by Mr. Parker on the direction by the first defendant to his son *viz.*, "Stop doing this, we are at risk." is not the construction to be placed on what he

said. By insisting on mate's receipts on 10th July, 1961 he was confirming, at least by necessary implication, that he knew that delivery to the shippers as opposed to delivery to the consignees was wrongful notwithstanding his own efforts to rectify the position by taking personal indemnities to avoid the consequences of such delivery. There may have been sympathy and trust. The fact that there was such trust does not absolve a wrongdoer from liability even if he was hoping that by paying the banks the shippers would save him from the consequences of his own wrongdoing in the first place.

That disposes of the two issues before me during the re-trial as to whether the first defendant Chan Cheng Kum is also liable. On the first issue, assuming the bare-boat charter point is still open, I find that there was in fact a bare-boat charter of the vessels to the second defendants by the first defendant who, at all material times, was their owner. On that finding, the second defendants would be, as the Federal Court has already held, liable in conversion but the first defendant is not, if the matter were allowed to rest there.

On the second issue, however, whether the first defendant was a joint tortfeasor with the second defendants in that conversion, by virtue of concerted action towards a common end resulting in the same damage in the same cause of action, I find that he was and that he is accordingly also liable in conversion together with the second defendants.

In view of my upholding the first preliminary objection before the re-trial began that section 11(1)(a) does not avail the plaintiffs so as to alter the common rule which bars the remedy they seek against the first defendant, judgment must be entered in favour of the first defendant with costs as to the proper apportionment of which I shall hear argument in due course.

Reasons for Upholding Preliminary Objections

I now turn to the reasons for my upholding the two preliminary objections raised by counsel for the first defendant as set out in Exhibits PD1 and PD2.

As Mr. Parker said, a unique situation, the like of which has never arisen before either in the United Kingdom or elsewhere in the Commonwealth has presented itself for resolution, in circumstances which, if he is right, the draftsman of section 6 of the English Law Reform (Married Women and Tortfeasors) Act 1935 which is reproduced in section 11 of our Civil Law Act (Cap. 30) never envisaged, not that he has not left himself open to criticism on other grounds.

My first reaction to the preliminary objections raised in the middle of the opening address by counsel for the plaintiffs was that someone was trying to indulge in a leg-pull or, as the more enterprising denizens from the land of the pilgrim fathers have expressed it in somewhat picturesque language, trying to "take somebody for a ride". My "terms of reference" or jurisdiction have already been clearly defined by the order of the Federal Court as confirmed later by the Privy Council and I thought that I had to deal only with one problem, namely, whether the first defendent was also liable. Little did I expect to be asked to decide what exactly the Federal Court meant by its judgment or to investigate whether it meant to say something other than that which the clear terms of the formal order convey.

Furthermore, it seemed to me strange that neither of these matters was ever raised or argued earlier either in the Federal Court or before the Privy Council. Hence the queries which I put to both counsel — see Ex. PD3, the answers to which are of no assistance to me whatsoever.

One matter is as clear as daylight, i.e. that the plaintiffs converted the interlocutory judgment which they asked for and obtained against the second defendants into a final judgment before the date of the Privy Council hearing.

Here was a glorious opportunity which was somehow missed to appraise the Privy Council of the facts giving rise to the unique situation which has now arisen for consideration, not by the appellate tribunals concerned as one would have expected, but by the High Court at the re-trial! I do not have the slightest doubt that these matters have been ventilated now in order that somehow they can, if necessary, be taken to the self-same appellate tribunals to which these matters should perhaps originally have been addressed, but for some reason, which is not quite clear to me, were not.

I do not propose to set out in detail the full arguments addressed to me by both counsel on each of these objections since I have taken a very detailed note of what they said as can be seen from my notes of evidence and arguments.

The Section 11(1)(a) Point

Section 11(1)(a) of the Civil Law Act provides: —

"11.—(1) Where damage is suffered by any person as a result of a tort (whether a crime or not) —

(a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage;"

Both parties have already set out their agreed position on this point in Ex. PD1 which I have reproduced earlier.

I found that section 11(1)(a) has not altered the common law rule, which the plaintiffs conceded bars their claim against the first defendant, so far as the present case is concerned. The plaintiffs had already converted the interlocutory judgment given by the Federal Court in their favour against the second defendants into a final judgment which remains unsatisfied.

Both the parties accepted the position that such a final judgment against the second defendants, though unsatisfied, was no longer a bar to an action against the first defendant as a joint tortfeasor if and only if he had not been "sued" within the meaning of sub-section (1)(a).

The plaintiffs contended that "sued" in this sub-section means "sued to final judgment" and that because the first defendant had not been sued to final judgment they were not barred.

The first defendant, on the other hand, contended that "sued" in this sub-section bears its ordinary and

natural meaning and that the first defendant, being a defendant in the same action in which final judgment had been given against the second defendants, has already been sued within such ordinary and natural meaning and that he was accordingly not a person who had not been "sued" within the meaning of this sub-section.

Mr. Parker contended that the plaintiffs were seeking two judgments in one action and that this was contrary to the single judgment rule in respect of joint tortfeasors. He said that this sub-section was not apt to cover one action against two joint tortfeasors where judgment has already been recovered from one of them.

As *Glanville Williams* says in Joint Torts and Contributory Negligence at page 68: -

"The rule was developed that judgment against one joint tortfeasor barred an action against another. The effect of this rule was that a plaintiff could not get more than one judgment against joint tortfeasors whether he sued them in successive actions or in the same action.

But, it may be asked, has not this rule now been abolished by the Tortfeasors Act? The answer is that the rule in its application to successive actions has been abolished, but that in its application to co-defendants in a single action it seems not to have been abolished. The wording of section 6(1)(a) of the Tortfeasors Act is not apt to cover the case where both joint tortfeasors are sued in the same action (cp. the words in paragraph (a): 'shall not be a bar to an action against any other person who would, if sued, have been liable'). Also, the sub-section clearly intends to accompany the new rule stated in paragraph (a) by the safeguard stated in paragraph (b), which makes the first judgment fix the upper limit of recoverable damages; yet the safeguard in paragraph (b) does not apply to cases where two tortfeasors are sued in a single action. It applies only where 'more than one action is brought'. On the whole it appears to be the better view, therefore, that the provision does not apply where tortfeasors are sued in a single action, and the former rule limiting the plaintiff to a single judgment still prevails."

It seemed to me, after carefully chewing and, so far as possible, trying to digest the arguments put forward by Messrs. Le Quesne and Parker on this point, that there was considerable substance in the view stated in the portion which I have just cited from Professor Glanville Williams. Although he expressed that opinion some considerable time ago, the better view would seem to be that sub-section (1)(a) has not in fact succeeded in abolishing altogether the single judgment rule in so far as it relates to joint tortfeasors in a single action, however unjust and arbitrary in its result its application may be, though technically correct. As the learned Professor has pointed out the safeguard stated in paragraph (b) does not apply to two tortfeasors who are sued in a single action.

I was also considerably impressed by the submissions of Mr. Parker on the meaning to be attached to the word "sued". After carefully considering the contending views on what it means, whether "sued" means "sued to final judgment" or whether it ought to be given its ordinary and natural meaning unless some special reason is shown to depart from that meaning I reached the conclusion for which Mr. Parker contended.

Mr. Parker had also submitted that to interpret "sued" in the manner advocated by Mr. Le Quesne would rob sub-section (1)(a) of any meaning and that it was not enough to say that "sued" means "sued to final judgment" as the first defendant had already been sued to judgment in his favour once before, i.e. at the original trial.

I am aware that in giving my reason now I must bear in mind that when I did give my decision on the first preliminary objection relating to the section 11 (1)(a) point I had not yet heard the case at re-trial and I must not allow my reasons for concluding as I did before the re-trial commenced to be coloured in any way by what I subsequently found on the facts at the end of the re-trial.

There is no doubt that the first defendant was in fact sued within its ordinary meaning when the original trial began as were the second defendants. I have no doubt that, had this been the original trial of the first defendant in which he had been sued for the first time alone and if the facts were that the second defendants had, in fact, in separate proceedings prior to that trial been sued and held liable and had had final judgment entered against them, I would have had no alternative except to hold that section 11(1)(a) did avail the plaintiffs subject to any such defence as that based on limitation. Was I, in the case before me, I asked myself anxiously, in exactly the same position as I would have been in the hypothetical situation which I have just posed? I came to the conclusion that I was not. I asked myself whether the fact that this was the same action, in effect, as the original action empowered me to decide that section 11(1)(a) availed the plaintiffs notwithstanding final judgment against the second defendants in the same action even though such judgment remained unsatisfied. I found myself unable to answer this question in the affirmative.

One of Mr. Le Quesne's arguments was that damages had been assessed against both defendants and he referred me to AB17 and submitted that, if the first defendant were to be held liable, he would be liable for the sum assessed. He seemed to consider that the mere fact that damages had been assessed was a factor which I should take into consideration in deciding whether I should overrule the objection. Mr. Parker pointed out that this was an unworthy point for the plaintiffs to take for a number of reasons one of which was that the order by the Federal Court applied assessment of damages against the second defendant and no one else.

Mr. Le Quesne also referred to the meaning of the word "liable" as used in section 11(1)(a) and relied on the proposition that "liable" there, according to him, meant "held liable in judgment" to support his proposition that "sued" must mean "sued to final judgment".

He referred to page 178 in *George Wimpey & Co. Ltd.* v. *British Overseas Airways Corporation*[9] where Viscount Simonds said that:

"the word 'liable' where it is secondly used in section 6(1)(c) ... means held liable in judgment."

It should be noted, however, that on the same page Viscount Simonds says:

"No other meaning can reasonably be attributed to it in the context 'would if sued have been' for these words make a suit the condition of liability."

It is interesting to note that Lord Porter said at page 180 after dealing with the common law rule, that:

"Section 6(1)(a) of the Act of 1935 was enacted in order to alter this result. Henceforward, the fact that the injured party had recovered judgment against one or more would not prevent his suing and obtaining judgment against the rest. In this collocation the first use of the word 'liable' must mean held liable in an action, because unless there is an action judgment cannot be recovered: the second 'liable' preceded by the words 'would if sued have been' might well be replaced by the words 'any other guilty party' but is by implication limited to one who has not been sued."

At page 188 Lord Reid points out that

"There are two points in subsection (1)(a) which should, I think, be noted. In the first place, the word 'liable' occurs twice and in each case it is clear that it must mean held liable. And secondly, in the phrase 'who would if sued have been liable as a joint tortfeasor' it appears to me that 'if sued' most probably means if he had been sued together with the tortfeasor first mentioned, because a person cannot properly be said to be held liable 'as a joint tortfeasor' if he is sued alone. If that is right, not only must the words 'if sued' here have a temporal connotation but they must refer to the time when the other tortfeasor was sued. But that conclusion depends on an assumption that the language of the provision is used accurately, and looking to the defective drafting of other parts of the sub-section it would, I think, be unsafe to rely on any inference from the form of drafting of sub-section (1)(a). With regard to sub-section (1)(b) I need only observe that the word 'liable' is there used in a context where it cannot possibly mean held liable. The context is 'if more than one action is brought ... against tortfeasors liable in respect of the damage' and liable that can only mean against whom there is a cause of action. So on any construction of the sub-section the word 'liable' must be held to have quite different meanings in different places in the sub-section. I am not prepared in this case to base my decision on any inference from similiarities of expression in either sub-section (1)(a) or sub-section (1)(b)."

In *Wimpey's* case, of course, the House of Lords was concerned with subsection (1)(c) and not with sub-section (1)(a).

It seems to me that in dealing with subsection (1)(c) the meaning attached to the word "sued" by their Lordships in the House of Lords was its plain and ordinary meaning. Having to choose between the plain and ordinary meaning of "sued" and the meaning ascribed to it by Mr. Le Quesne I decided that logic and common sense demanded the construction placed on the word "sued" by Mr. Parker, namely, that it bears its plain and ordinary meaning and not "sued to final judgment". A person may be sued to final judgment and be held not liable in judgment as happened at the original trial in the case of both the first defendant and the second defendants. It may well be that the legislature did not intend the interpretation for which Mr. Parker contended but the fact remains that it has not succeeded in conveying the meaning, for which Mr. Le Quesne contended, in clear and unmistakable language.

I accordingly upheld the first preliminary objection.

Second Preliminary Issue; The so-called Bare-boat Charterparty Point

The objection based on the so-called "bare-boat" charterparty point as set out in Ex. PD2 was, at first, said to arise only if the first preliminary objection raised by the defendants on the section 11 point failed but it was later agreed that I should decide this point as well, even if the first objection succeeded, in order to determine the proper scope of the re-trial ordered by the Federal Court.

I should have thought as I have earlier said that the order for re-trial clearly defined the issue before me, i.e. whether the first defendant was also liable.

Mr. Le Quesne, however, for the plaintiffs had, in opening, already invited the objection in question by stating that the Federal Court might have adjudged the wrong defendant liable but, as he conceded in Ex. PD2, the only basis upon which judgment could have been given against the second defendants was that the master and crew were the servants of the second defendants and not of the first defendant as pleaded at paragraph 3A of the amended defence.

The plaintiffs conceded also that if there was such a bare-boat charterparty in existence, then the master and crew were servants of the second defendants and not of the first defendant. They were not employed jointly by the second defendants and the first.

Paragraphs 8, 9, 10 and 11 of Ex. PD2 set out clearly the opposing contentions and I was invited by the plaintiffs to hold that the Federal Court intended by the whole of their written judgment that I should re-try the whole issue as to whether the first defendant or the second defendants or both were liable for the conversion of the goods notwithstanding the last paragraph thereof, the formal order and other matters relied upon by the first defendant.

The point I had to decide on the objection raised by the first defendant was whether the plaintiffs should be allowed to contend that the master and crew were servants of the first defendant and not of the second defendants, *viz.*, that there was no bare-boat charterparty in existence.

I decided that it was not open to the plaintiffs to do so.

The Federal Court judgment admittedly could be sustained only on the basis that there was in fact a bare-boat charterparty. That is the judgment for which the plaintiffs asked and did in fact obtain notwithstanding that page 375 of the record contains in the written judgment a reference to the fact that both parties had agreed that the issue on whom liability should fall, if proved, could not be properly dealt with in the appeal as its determination depended almost entirely on the credibility of witnesses.

No one knows exactly when Mr. Kerr asked for judgment against the second defendants in the course of the argument in February 1967 before the Federal Court. It was certainly after the commencement of the appeal when it was agreed that liability should be left open and he must then have been well aware that he could only get the judgment he asked for against the second defendants in one of two ways: —

either (a) it had to be found by the court against the plaintiffs in favour of the first defendant that his allegation in paragraph 3A of the further amended defence at page 12 of the record (which is actually a joint defence) was established;

or (b) it had to be admitted by the plaintiffs that the master and crew were the servants of the second defendants and not the first.

As Mr. Parker said, the court in July 1967, gave judgment for which Mr. Kerr asked and stated with absolute accuracy the consequence of that judgment that the only remaining issue was whether the first defendant was also liable.

Despite the clarity of the formal order taken out on that judgment by the plaintiffs they sought to contend that the Federal Court intended to leave the whole question of who was liable open. To contend thus was according to Mr. Parker, "to attribute to the Federal Court either confusion or loss of memory or total insanity or both".

It seemed to me when I upheld Mr. Parker's objection that the Federal Court were more probably giving effect to an admission by the plaintiffs that the master and crew were servants of the second defendants and not the first, based on an acceptance of paragraph 3A of the defence as amended than to a finding of fact which the parties had earlier agreed involved the credibility of witnesses though the Federal Court may have been doing both because of such admission.

The fact remains that the Federal Court gave judgment on this aspect of the matter pursuant to Mr. Kerr's request, which as appears from Ex. PD2, could only have been given on the basis that it was either proved or admitted that the master and crew were the servants of the second defendants *viz.*, that there was, in fact, a bare-boat charterparty.

Mr. Parker said that, quite apart from the impossible situation which would arise if I were to reach a different conclusion from that contained in the order for re-trial, the estoppel rule applied to the judgment of the Federal Court. Citing Farwell L.J. at page 144 of *Harriman's* case, to which I have already referred, he submitted that as between the parties the ordinary doctrine of estoppel applied. He also relied on Fletcher Moulton L.J's reference in that case to the binding estoppel created between parties in civil actions.

By specifically stating that the goods were released by the second defendants the Federal Court, he submitted, necessarily found that the master and crew were their servants and that, even if, as Mr. Le Quesne contended, the Federal Court were mistaken in stating that certain facts were never in dispute, Mr. Kerr's request for judgment against the 2nd defendants made that dispute cease to exist.

Mr. Le Quesne, on the other hand, relied on *Isaacs* v. *Salbstein*[10] for the proposition that a judgment obtained against the wrong defendant does not preclude the pursuit of the defendant, who is in fact liable, for the same relief. He said he was not barred from proceeding against the first defendant on the basis that he was not necessarily a joint tortfeasor.

Secondly, he said he was trying to show that the first defendant was a sole tortfeasor because there was no oral bare-boat charterparty.

He admitted that, if the estoppel rule applied, then he was barred but agreed that the Federal Court judgment was not a judgment to that effect which is binding on the plaintiffs so as to produce an estoppel.

Next he said he was not relying on the same cause of action.

He invited the application of caution in ensuring that the grounds of decision were perfectly clear and submitted that the estoppel rule should not be regarded as extending to the grounds unless the grounds can be clearly discovered from the judgment itself.

He said that it could not be clearly discovered that there was a finding or an admission of a bare-boat charterparty in the written judgment.

He finally said that he was not asking the court to say that the second defendants were not liable and that he was asking only for a judgment that the first defendant was liable.

Mr. Parker, in reply, said that the *Isaacs* case did not help the plaintiffs in these proceedings. There was no question of the cause of action being a different one in respect of each of the defendants. He submitted that the central fallacy in Mr. Le Quesne's argument lay in his adoption of the definition of "cause of action" cited by Bankes L.J. at page 154 and in arguing that, because different facts might have to be proved against each of three different groups of people, they could not also be joint tortfeasors, as for example, a servant group, a group like the 2nd defendants as employers, and a complete stranger acting in concert with them. Although other facts may have to be established to show responsibility for the same tort the vital fact common to all three groups would be the misdelivery of goods which would only go to show one tort. This was the "injuria" and as Scrutton L.J. said in the *Koursk* case at page 157 "What constitutes the cause of action is the *injuria*, the wrong done by a separate tortfeasor," citing the view of Collins L.J. in another case.

I agreed with Mr. Parker that this definition was to be preferred to the one cited by Bankes L.J. in the *Isaacs* case which, no doubt, in relation to the facts of that case appeared plausible though it could not be precisely right as a general proposition.

The better view to take with regard to the respective contentions on the bare-boat charterparty point was, I considered, that view for which Mr. Parker contended in order that sanity might prevail. It would have been quite impossible for me to have proceeded with the re-trial on any other basis as to the scope of the trial than that clearly conveyed in the order for re-trial which required a determination whether the first defendant was also liable.

I accordingly held that the second preliminary objection was well-founded.

Judgment for the defendants.

Solicitors: *Allen & Gledhill; Drew & Napier.*